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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

MARIO A. RUIZ,

Defendant and Appellant.

A123731

(Marin County  
Super. Ct. No SC148378A)

Appellant seeks review of his sentence upon his guilty plea to assault by means of force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1)).<sup>1</sup>

Assigned counsel has submitted a *Wende*<sup>2</sup> brief, certifying that counsel has been unable to identify any issues for appellate review. Counsel also has submitted a declaration confirming that appellant has been advised of his right to personally file a supplemental brief raising any points which he wishes to call to the court's attention. No supplemental brief has been submitted. As required, we have independently reviewed the record. (*People v. Kelly* (2006) 40 Cal.4th 106, 109–110.) We find no arguable issues and therefore affirm.

I. BACKGROUND

On June 22, 2006, appellant and another man assaulted Cesar Coroy with fists and feet after Coroy, a cashier at a convenience store, had earlier refused to sell alcohol to

<sup>1</sup> All further code references are to the Penal Code unless otherwise indicated.

<sup>2</sup> *People v. Wende* (1979) 25 Cal.3d 436.

appellant.<sup>3</sup> The victim suffered bumps and cuts to his head, face and back. On July 6, 2006, appellant returned to the liquor store and threatened to assault Coroy again. A felony complaint was filed against appellant on July 7, 2006, charging him with assault by means of force likely to produce great bodily injury (§ 245(a)(1)) and making criminal threats (§ 422). A third misdemeanor count charged appellant with battery (§ 242). Following preliminary hearing on October 20, 2008,<sup>4</sup> appellant was held to answer and a felony information was filed containing the same charges. Appellant entered a plea of not guilty and filed a motion to dismiss the charges on the grounds that he had been denied his right to a speedy trial. Prior to hearing on the motion, appellant appeared with counsel and a Spanish language interpreter and entered a plea of guilty to the felony assault charge. The remaining charges were dismissed. He was advised that he could be sentenced to up to four years in state prison (the aggravated term) as a consequence of his plea, and agreed that the court could consider the dismissed counts in deciding what sentence would be imposed.<sup>5</sup> Appellant further waived his right to jury trial on any fact to be considered by the court in aggravation of his sentence.<sup>6</sup>

On January 7, 2009, appellant appeared for sentencing. After consideration of the report and recommendation of the probation department and argument of counsel, the court denied probation, denied appellant's motion to reduce the charge to a misdemeanor pursuant to section 17, subdivision (b), and sentenced appellant to the aggravated term of four years in state prison, with credit for time served of 207 days, imposing a restitution fine and a suspended parole revocation fine in the amounts of \$800 each. (§§ 1202.4, subd. (b); 1202.45.)

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<sup>3</sup> The facts surrounding the incident are found in the transcript of the preliminary hearing and in the presentence report.

<sup>4</sup> Appellant apparently failed to appear following release from custody and a bench warrant was issued for his arrest on August 17, 2006, which was not served until June 25, 2008.

<sup>5</sup> See *People v. Harvey* (1979) 25 Cal.3d 754 (*Harvey*).

<sup>6</sup> *Blakely v. Washington* (2004) 542 U.S. 296; *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Blakely/Apprendi*).

Appellant filed a timely notice of appeal on January 12, 2009.

## II. DISCUSSION

While the brief submitted by appellant's counsel indicates that the appeal is authorized pursuant to section 1237.5, that section provides for appeal from a plea of guilty only upon application for, and issuance of, a certificate of probable cause.<sup>7</sup> No such certificate was obtained here and therefore no issues are before us relating to appellant's plea. (*People v. Mendez* (1999) 19 Cal.4th 1084, 1097.) His notice of appeal, in any event, specifies that he seeks review of his sentence. (Cal. Rules of Court, rule 8.304.)

As noted *ante*, the terms of appellant's plea specifically included *Harvey* and *Blakely/Apprendi* waivers, and permitted the court to consider the dismissed charges, and to consider factual matters not proven to a jury, in determining the appropriate sentence to be imposed. Imposition of an aggravated term within the statutory sentencing triad is, in any event, subject to the sound discretion of the trial court. (§ 1170; Cal. Rules of Court, rule 4.420(b); *People v. Black* (2007) 41 Cal.4th 799, 815.) The trial court set forth on the record its reasons for denial of probation and for imposition of the aggravated term, including appellant's lack of remorse, his conviction for a prior felony assault, his flight to another state, and his convictions for other violent felonies while a fugitive in that state.

No arguable issues are presented.

## III. DISPOSITION

The judgment is affirmed.

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<sup>7</sup> Section 1237.5 provides: "No appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty or nolo contendere, or a revocation of probation following an admission of violation, except where both of the following are met: [¶] (a) The defendant has filed with the trial court a written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings. [¶] (b) The trial court has executed and filed a certificate of probable cause for such appeal with the clerk of the court."

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Bruiniers, J.

We concur:

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Jones, P. J.

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Needham, J.